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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-975

DAVID BELL,

Petitioner,

against

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-4178

SHIRLEY ADELSON SIEGEL
Solicitor General

CLEMENT H. BERNE
Assistant Attorney General
of Counsel

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Opinion Below

Copies of the opinion of the District Court, unreported to date, and the order of the Court of Appeals for the Second Circuit, affirming on the opinion below, are annexed to the petition.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C.A. § 1254(1).

Questions Presented

1. Whether the district court was correct in denying the petition for a writ of habeas corpus on the grounds that the sentence imposed, a $1500 fine and a one year conditional discharge, contained no restrictions harsh enough to constitute custody and that consequently the jurisdictional requirement of 28 U.S.C. §§ 2241(c)(5), 2254(a) was not satisfied?

2. Whether the present proceeding should have been dismissed for lack of subject matter jurisdiction because the fine imposed had been paid and the term of the conditional discharge had expired long before the filing of the petition for a writ of habeas corpus?

Facts

Petitioner was convicted on April 20, 1976 after a jury trial in the County Court of Sullivan County on the crimes of reckless endangerment in the second degree (Penal Law § 120.20) and resisting arrest (Penal Law § 205.30). The sentence imposed was a fine of $750 on each count and two one-year conditional discharges to run concurrently. In explaining the terms of the conditional discharge, the trial court stated:

> ". . . you are to avoid any injurious or vicious habits, you are to refrain from frequenting unlawful places and consorting with disreputable persons; you are to refrain from any further violations of the law.

> Now, these conditions I know you can comply with because I am sure that based upon your past background you are not criminally inclined to do any of these things. However, those are the conditions that must be complied with." [trial minutes at 973]

Petitioner paid the $1500 fine on April 21, 1976, and the period of conditional discharge expired on April 19, 1977.

The judgment of conviction was affirmed by the Appellate Division, Third Department, on January 9, 1978. The New York Court of Appeals denied leave to appeal on February 21, 1978. Applications for reconsideration of the denial of leave to appeal were denied by the Court of Appeals on March 10, 1978 and April 11, 1978.

Some two years after paying the fine and one year after completing the conditional discharge petitioner commenced the present proceeding.

REASONS FOR DENYING CERTIORARI

A.

The District Court Correctly Denied Habeas Corpus Relief as the State Sentence Contained No Restrictions Constituting Custody and the District Court, Therefore, Was Without Jurisdiction to Entertain the Petition.

The federal courts will entertain applications for habeas corpus relief only on behalf of persons "in custody" pursuant to state court judgments of conviction. 28 U.S.C.A. §§ 2241(c)(3), 2254(a). *Carafis* v. *LaVallee,* 391 U.S. 234, 238 (1968); *Russell* v. *City of Pierre,* 530 F. 2d 791, 792 (8th Cir.), *cert. denied* 429 U.S. 855 (1976); *Pueschel* v. *Leuba,* 383 F. Supp. 576, 579 (D. Conn. 1974). The "in custody" jurisdictional requirement has been relaxed somewhat to include more than the imposition of a term of imprisonment. See *Jones* v. *Cunningham,* 371 U.S. 236

(1963) (persons under parole supervision); *Hensley* v. *Municipal Court,* 411 U.S. 345 (1973) (persons released on their own recognizance but facing future incarceration should habeas relief be denied). This Court, however, has continued to emphasize that the extraordinary remedy of habeas corpus is limited to cases of special urgency where "severe restraints on individual liberty" are imposed and that only the more conventional remedies are available in other cases. *Id.* at 351. As the state court imposed no severe restraints in the present case, the district court correctly ruled that the federal courts are without subject matter jurisdiction to review petitioner's claims.

Petitioner's sentence was a $1500 fine and a conditional discharge. It is well settled that the imposition of a fine does not constitute a restraint sufficient to confer jurisdiction upon the federal habeas court. *Hanson* v. *Circuit Court,* 591 F. 2d 404 (7th Cir. 1979); *Russell* v. *City of Pierre, supra; Edmonds* v. *Won Bae Chang,* 509 F. 2d 39 (9th Cir.), *cert. denied* 423 U.S. 825 (1975); *Schifter* v. *United States,* 428 F. Supp. 611 (EDNY 1977); *Peuschel* v. *Leuba, supra.*

Moreover, as the district court correctly ruled, the terms of the conditional discharge included "no restrictions harsh enough to constitute custody" (A. 6).* New York Penal Law §§ 65.01(1), (2) provide that where appropriate the sentencing court shall release the defendant without imprisonment or supervision, but subject during a set period to such conditions as the court specifies. In the present case the sentencing court instructed petitioner,

> "to avoid any injurious or vicious habits . . . to refrain from frequenting unlawful places and consorting with disruptable persons . . . to refrain from any further violations of the law." [trial minutes at 973].

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* Page references preceded by "A" are to the Appendix annexed to the petition.

Thus, petitioner was subject to neither the close personal supervision concerning the details of his private life, nor the imminent threat of imprisonment without a court hearing, which are imposed upon persons on probation or parole. See *Jones* v. *Cunningham, supra,* 371 U.S. at 241-242. Like revocation of the driving privilege, which certainly would be a more serious and disruptive restriction of liberty, the conditions of petitioner's discharge do not constitute the sort of severe restraint which has been held to be the equivalent of physical custody for purposes of establishing federal habeas jurisdiction. *Cf. Westberry* v. *Keith,* 434 F. 2d 623 (5th Cir. 1970). Accordingly, the District Court correctly denied the petition.

B.

Assuming, *Arguendo,* That the Sentence Imposed Constituted Custody, the Petition Was Nevertheless Properly Denied as the Sentence Was Fully Satisfied Prior to the Commencement of This Proceeding.

In defining the jurisdiction of the federal courts the habeas corpus statute "requires that the applicant must be 'in custody' when the application for habeas corpus is filed". *Carafis* v. *LaVallee, supra,* 391 U.S. at 238; *accord, United States ex rel. Myers* v. *Smith,* 444 F. 2d 75 (2d Cir. 1971); *United States ex rel. Wojtycha* v. *Hopkins,* 517 F. 2d 420, 423 n. 6 (3d Cir. 1975). While the collateral consequences of conviction may prevent the timely commenced proceeding from becoming moot subsequent to the satisfaction of the sentence imposed, such disabilities are by themselves insufficient to establish subject matter jurisdiction. *Carafis* v. *LaVallee, supra; United States ex rel. Myers* v. *Smith, supra,* 444 F. 2d at 77; *Pueschel* v. *Leuba, supra,* 383 F. Supp. at 80. As the district court observed, to hold otherwise would be to "render the custody prerequisite entirely meaningless" (A. 6); *accord Furey* v. *Hyland,* 395 F. Supp. 1356, 1360 (D.N.J. 1975), *aff'd* 532 F. 2d 746 (3d Cir. 1976).

In the present case petitioner fully paid the fine on April 21, 1976. The one year period of conditional discharge commenced on the day it was imposed, New York Penal Law § 65.15(1), and expired on April 19, 1977. The petition, dated May 25, 1978, was filed on June 28, 1978, more than a year after the sentence was fully satisfied. Thus, even assuming, *arguendo,* that the sentence imposed constituted custody within the meaning of the federal habeas corpus statute, petitioner was nevertheless not in custody at the time this proceeding was commenced. Accordingly, federal jurisdiction did not attach, and for this additional reason the petition for *certiorari* should be denied.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: New York, New York
March 3, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent

SHIRLEY ADELSON SIEGEL
Solicitor General

CLEMENT H. BERNE
Assistant Attorney General
of Counsel